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## JURISDICTION OF STATE BOARD IN FIXING RATES BETWEEN TWO PORTS IN A STATE WHERE ROUTE IS OVER THE HIGH SEAS.

It has been held that a state board may not fix and enforce rates for traffic moving from one point in a state to another in the same state, where the shipments passed any appreciable distance through another state because this would be an attempt to regulate commerce among the several states. In California the question arises whether or not a vessel plying between two ports in a state is subject to regulation by a state board, where its route is over the high seas. Wilmington Transp. Co. v. Railroad Commission, 137 Pac. 1153.

The commerce clause of the Constitution reads: "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states and with the Indian tribes," and under it our Supreme Court has held that a vessel engaged in gathering sponges on the high seas and transporting them to the United States is engaged in foreign commerce and is amenable to the regulative power of Congress. Abby Dodge v. U. S., 223 U. S. 166. By this decision it would seem that the court held that what is taken from the high seas is taken from a foreign country in the sense of the commerce clause.

But here the question is whether merely using the high seas as a route between points in a state is regarded as outside of state lines, so far as the commerce clause is concerned.

It does not seem to present the same difficulty in supposing that Congress should protect our coast from the introduction from the high seas of merchandise picked up thereon or from thereunder, as that it was intended to interfere with state regulations over vessels, which, in plying between ports of the same state, passed outside of the shore mark, and entered the area common to all nations. This is a practical, as well as a theoretical question. Vessels in thus being upon the high seas would be there as of common right and when they passed over the line they took upon themselves no obligation to any other authority.

This line that puts a vessel upon the high seas is but an imaginary line and it depends greatly on the configuration of the nearest land bounded by the sea. U. S. v. Grush, 5 Mason, 290, was where Justice Story defined the term high seas as being the uninclosed water which is without the *fauces terrae* on the seacoast, and it is evident that it might constantly be changing. When the commerce clause speaks of commerce among the several states it refers to something more permanent in its nature, and, generally, it refers to commerce which would belong to one state or another, but for the intervention of the clause.

But an incidental crossing of waters not between narrow headlands or promontories and the raising of questions of fact as to what is uninclosed sea hardly was meant, where all of it was for the free traversing of seacraft.

This commerce clause arose out of the necessities of our form of government, and it is to be applied to suit our convenience. If the sea produces articles of commerce, e. g. sponges, as in the Abby Dodge case, *supra*, then the clause would attach, and if it remains a highway then it would not attach. The clause operates in an exclusive way, but not to interfere unless there is a necessity for interference or to control a particular subject.

Take also questions in maritime law and there it is readily seen the federal law must take hold. Ford v. Steamship Co., 102 U. S. 541; Re Garnett, 141 U. S. 1. In such case there is no question of commerce with a foreign nation involved. The clause says "commerce with foreign nations," and we might go far beyond the border line of high seas before there would be any question of commerce with a foreign nation.

The California court rightly held, we think, that all transportation over waters outside of the territorial waters of a state is not necessarily commerce with foreign nations. The clause more correctly seems to embrace commerce with a specific foreign nation and not commerce with the high seas in which our government and all governments have the same interest, and that interest the right freely to traverse. The high seas as a route is not supposed to have any commerce.

## NOTES OF IMPORTANT DECISIONS.

**DEATH—ADMISSIBILITY OF EVIDENCE AS TO NUMBER OF CHILDREN LEFT BY DECEDENT IN ACTION FOR.**—In Iowa "the only true measure of recovery for the death of an individual is the value of his life to his estate," and therefore under a statute having this idea in view it was held that it was not improper to admit evidence of the number of children he left. It was thought that just as the fact of decedent's marriage tended to show an incentive to thrift and accumulation, the further fact that he had children was admissible on the same theory. Nicoll v. Sweet, 144 N. W. 615.

Two judges dissented from this view, but they proceeded along the line that the court should exercise some control over the admissibility of testimony, and where the evidence is more calculated to excite sympathy than to show what would be the value of one's life, it ought to be excluded.

If the beneficiaries of decedent's life, or their representatives, had to bring an action for his death, a question of this kind could hardly arise, because it would appear in the pleadings, whether he had a wife or a wife and children or not. And why should it not appear who are the beneficiaries, when in some states the rule of recovery is said to be according to the interest there is in decedent's life on the part of the plaintiff. Under these circumstances defendants might be more than glad to show a decedent had left neither wife nor children. These statutes, as the majority in this case show, express a "rule that is vague, uncertain and speculative, if not conjectural, but it is the best which judicial wisdom and experience has yet been able to formulate." A widow can bring her children into the court room with her and yet they cannot be referred to in the testimony! Why have an inconsistency of this kind?

PARDON—UNACCEPTED TO TOLL PRIVILEGE AGAINST INCRIMINATION.—In U. S. v. Burdick and Curtin, 40 N. Y. L. J. 2731, Hand, D. J. gives his view for the observance of a pardon removing the reasons for a witness refusing to testify on the ground, that his answers will tend to incriminate him.

In this case there was an attachment for contempt for refusal by two witnesses to testify regarding the sources of their information as to customs frauds, they contending that disclosure would subject them to prosecution under certain sections.

The judge reviews the instances of pardons, which in this country have been confined to amnesty proclamations, but in only one instance was there a pardon for any such purpose as in this case. It is recited that: "President Jefferson appears to have issued a pardon to a proposed witness in the trial of Aaron Burr, with a view to tolling the privilege, but though the witness refused to accept it, I cannot learn that the question of privilege was raised upon the trial itself." But, whether refusal would be considered, it was said: "The witness only needs protection and he is protected when the means of safety lies at hand. If he obstinately refuses to accept it, it would be preposterous to let him keep on suppressing the truth on the theory that it might injure him. Legal institutions are built on human needs and are not merely arenas for the exercise of scholastic ingenuity."

The precedent thus set may call into exercise quite frequently the pardoning power, instead of prosecuting officers promising freedom from prosecution.

## OBSERVATIONS ON REFORM OF THE LAW AND THE COURTS.*

The iconoclastic hand of reform, having dealt with more or less violence with practically every other subject of general concern, is now stretched toward the laws and the courts. As is usually the case with reform agitations, there is manifested a contemptuous disregard for traditions and institutions of the past and a gross carelessness of future results which, combined with

*Paper read before the Bar Association of the Nineteenth Judicial Circuit of Missouri.

a disposition to disturb governmental equilibrium by removing the conservative restraining force of the courts of law lately so widespread and supported by public men of great genius of leadership, tend to produce a situation worthy of serious consideration, to say the least.

Reforms based upon real and existing public necessities, and accomplished at the end of the mature deliberation of thoughtful and reasoning minds, are not objects of dread, but ought rather to be encouraged, especially by members of any class directly affected, whether their own peculiar interests be promoted or not. But reforms born of ambition for political power and carried into effect upon waves of political excitement seldom have any corrective influence, and usually prove upon experiment to be reforms in name only.

Judges of the courts and students of the law, already recognized as conservatives, have, as a class, failed to engage in the promotion of strange doctrines, and the consequent displeasure of reform advocates has found expression in the term "reactionaries," which has indeed been applied with marked impartiality to all who have counseled cautious and deliberate action. But revolutions have their price, and only occasionally do they prove worth their cost, and men whose habits and associations lead to a close observation of this general truth feel impelled, regardless of the temporary displeasure of others, to resist the adoption of radical measures in public reforms until the most careful consideration from every conceivable viewpoint assures beyond serious question the probable beneficence of the results to be expected.

The reform measures which are now proposed as calculated to correct existing evils and abuses in the administration of the law are almost as numerous as the individual advocates of the reform theories, but in general they pretend only to effect changes in the rules of court procedure. Nevertheless they present, in part, at least, suggestions so contrary to all accepted forms of established order in the direction of human affairs that they have so far failed of the support of any considerable number of judges and lawyers of the country.

It may aid to a better understanding of the views to be presented here, if we do not lose sight of the fundamental fact that the legitimate office of government is the attainment and security of a stable and settled condition of society. The history of human governments exhibits a continuous and prolonged effort to accomplish this end, which, until comparatively recent times, was approached in a greater or less degree by the suppression of individual activity. The more ancient theory was that the security of the prerogatives of the ruling power and the stability of the organized state was possible only in inverse ratio to the degree of recognition accorded by the sovereignty to the individual or personal right. This theory, which still prevails with some unimportant concessions in practically all of the Old World nations, was transplanted to American territory by the colonist, who knew no other and therefore regarded it as the only substantial basis upon which an orderly condition of society could be maintained.

Without attempting a review or discussion of the causes which necessitated such a course, it suffices here to recall that the establishment of independent American government developed a radically different theory—that of maintaining together an orderly society and an unrestricted individual activity. It was the bold conception of the founders of this government (born perhaps of the difficulties attending the application of any previously tried theories) that man could be at once civilized and free. This is the principle which distinguishes American liberty, and which, denounced in its beginning by every respectable political authority as visionary and impractical, has in its operation challenged the attention and admiration of the world as a nurturer of a strong social fabric and tremendous political power.

But the paternal spirit exemplified by the Puritanical regulation of personal conduct and the general communistic training of the colonial period were not readily extinguishable; to the contrary, recognition of the individual unit by periodic returns to expression of the popular will afforded excellent ground for the growth in lesser jurisdictions of the identical element found so objectionable in the formation of the larger. This communistic spirit has continued to demand the closer and closer restriction of individual activity, and, not knowing any governmental principles of general application, it has resorted from time to time to such specific prohibitives as have promised a correction of the alleged evils which have excited popular resentment.

The courts of law, established in the Constitution as a co-ordinate branch of the government, have felt bound to the fundamental principle of that government—the widest personal liberty and the least possible regulation of individual conduct. Hence the course of judicial decision, where not forcibly directed otherwise, has tended toward the protection and preservation of every personal privilege not opposed to the peace and good order of the community. As the individual has been both persistent and resourceful in evading restrictive measures, and the courts have not found themselves free to extend the application of such measures beyond their express terms, an apparent divergence has grown up between the course of the law as directed by statutory enactment and its course as delivered from the bench. This divergence is not so marked in federal jurisdictions, but in the states, where the legislative bodies are more wieldy and more directly responsive to the prevailing sentiment of the electorate, the multiplication of statutes designed to limit the field of human action and direct the range of human energies point to the development of a governmental spirit more fitting a "land of the brave" than a "home of the free."

These observations are deemed pertinent here, not as disclosing new facts, but because of the prevailing tendency to overlook them as important contributing elements to the growth of American law and a growing disposition to emphasize unduly the failure of the American courts to respond to the demands of the communistic spirit for the suppression of the common liberties of the individual subject. They are also important in the consideration of a possible future course for the avoidance of confusion and conflict, and interesting for the further reason that they reveal the remarkable truth that the individual, in his proper sphere as the dominant force of the government, pursues a course opposed to a paramount funamental principle of that government and in restraint or suppression of the personal liberties which that government was designed primarily, among other things, to secure.

The common plaint of the reformer is that, though we live in an age of marvels of transportation and communication, an age of wonderful achievements in fields of finance, commerce, and industry, and of high personal efficiency in every other department of human endeavor, the law continues in an ancient and primitive state of mysterious learning and dogmatic doctrine designed to effect the technical evasion of the natural and logical sequence of events; that courts are indifferent to the economy of time and money, reckless of the natural rights of litigants, and careless of the efficiency of their own service; likewise, that the modern man of commerce, having himself reached the highest attainable degree of human efficiency, finds every possible facility at hand for the successful exercise of his energies everywhere except in the courts; that if unfortunately such a man becomes involved in litigation he suffers a sacrifice in time and in values rendered unavailable pending the determination of his controversy that is out of all reasonable proportion to the service rendered to him or to the community. Generous fault is also found with the distinctions

between the various forms of actions and their attendant rules of pleading, the enforcement of court rules designed to effect an orderly and uniform course of procedure, and the occasional hardship caused by the application of the fixed principles of the substantive law to the facts of a particular case. This enumeration includes the principal subjects of the reformer's attack, and they are new to the profession only in that they have lately become topics of general consideration and discussion and have been utilized to justify the promulgation of political doctrines involving extremely radical measures of reform.

In many jurisdictions the courts and legislatures have both labored toward the simplification of judicial procedure. The codes of the states and the decisions of the courts abound in provisions designed to facilitate the administration of the law by removing such technical distinctions as have been found by experience to serve no good purpose either for the prevention of wrong or the protection of right. In the opinion of many eminent contributors to the body of modern law legislative powers have gone far beyond their legitimate province in forbidding reversals of judgments by reviewing courts except in cases where it is affirmatively shown that the substantial rights of the complaining party have been injured. The sounder judicial view is that every party to a cause is entitled to a trial of its issues according to the settled rules of the law and procedure applicable to his case; that anything less than this or different from this cannot, and does not, constitute the one fair and impartial trial according to law to which such party is entitled, and if error has intervened to cause a departure therefrom, it does not lie in the province of any power to judge the effect upon his substantial rights and oblige him to accept a result of a human estimate of the substantiality of his interests instead of the result of the process guaranteed to him by his sovereign state. Nevertheless, the courts have viewed such statutes liberally, and in nearly, if not quite every instance, have given them the full force and effect intended for them.

The spirit of communism, however, which knows no guide but the prevailing sentiment of the time, and which is an inseparable concomitant of the expression of the popular will, would completely destroy the independence of the judiciary as a co-ordinate branch of the government and would reduce it to the level of the legislative power, which has long bent its knees in subservience to this tyrannical master's whims. Among the remedies prescribed now is the removal of the distinctions existing between the various forms of actions and the abolition of the rules of pleading, unrestricted judicial discretion in the admission and exclusion of evidence, and the summary disposition of each case according to the "principles of natural justice." And as security against a departure from this arbitrary scheme, there is to be provided the recall of judges and judicial decision. In short, the favored plan is to place it within the power of a trial to judge to produce a result in each case in harmony with the public conception of its merits, and to force him, at the cost of his judicial office, to produce that result. The arguments advanced in support of such radical remedies abound in general promises of great public benefit, but when reduced to a last analysis are found to contain little of definite substance.

Whether all or any distinctions in the forms of action or any or all of the rules of pleading shall be retained or abolished, is a question of interest to the practitioner alone. So also is the enforcement of the rules of procedure, especially in the courts of review. It has not yet been insisted that the process of litigation is susceptible of such simplification that each litigant may prosecute and defend his own cause without regard to the laws and rules of procedure as now known to the counsellor and advocate, but if it were possible to conceive of such a condition as a practical thing, surely the high-tensioned and efficient man of com-

mercial, industrial, or financial pursuits would be a sorry figure awaiting the call of court dockets. His loss in time and in values tied up under such a system, would be multiplied many fold. That any relaxation from the forms and rules of court procedure as they now exist, would induce a more ready or satisfactory dispatch of court business is doubtful. That order and uniformity can only be secured by the enforcement of reasonable rules of procedure is a fact conceded universally. And it is a safe venture that so long as rules and laws exist, some will fail for lack of compliance therewith. There have always been in every branch of human enterprise the careful, diligent and efficient on the one hand, and the careless, indifferent and incompetent on the other. The one has always succeeded and the other has always failed. The path of procedure could hardly be made so straight and plain that the one could follow, nor so intricate or hidden that the other would not search it out.

However, the summary disposition of disputed matters according to the principles of "natural justice" is the keystone in this arch of proposed reform. Like other generalities of its kind, as a promise it contains everything; as a substance it contains nothing, for the very simple and sufficient reason that there is no such thing in nature as justice. Nature no more knows justice than she knows morals. Justice is the product of civilization, crystallized in the law and administered in accordance with the forms of law. The decalogue was not a gift to the man of nature, but a revelation of divine will to the man of society, the artificial man. Untold ages of time passed between the creation (or evolution, if you happen to belong to the monkey tribe) of man and the first human conception of the three primary rights recognized by the common law—personal liberty, personal security, and private property. The rule of nature is "survival of the fittest." Man as the product of nature is an aggressive and predatory creature, taking by physical force or animal cunning, or both, from all weaker possessors with whom he comes in contact, and holding until forced to yield to some power stronger than himself. Of the three primary rights mentioned, only one—that of personal liberty, can be said to be a natural endowment.

We are answered, however, that as the law "always leaves something to the wisdom and discretion of a just man," the principles and rules of the substantive law may be so relaxed that no case of hardship to one or undue advantage to the other party to any cause shall result, and no public interest shall suffer for lack of applicable means of protection or preservation. This is but a repetition in the application of the law of what has already been observed as desired in the means of application. Reduced to its lowest terms, it may be correctly stated as the subordination of all fixed and settled rules and principles to two controlling elements—judicial discretion and public policy, the one largely the product of the other, and amounts to no less than an exact reversal of the usually accepted theory of the relation of the fixed law to these hitherto subordinate subjects.

While it is true that in the application of the principles of law to any state of facts under judicial consideration or review something is generally confided to a sound judicial discretion, yet the limitations of that discretion have been generally fairly well defined by the very law which calls it into action. The Supreme Court of the United States has defined judicial discretion in these words: "Judicial power, as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law and can will nothing. When they are said to exercise discretion, it is a mere legal discretion." Courts have universally discouraged the enlargement of this power beyond its proper legal limits, and have never, until very late times, ceased to denounce the idea that it could or ought properly to be converted into a mere personal discretion of a judge. In an early Missouri case the Supreme Court, after de-

claring that "the most dangerous of all laws would be those depending on the discretion of judges," quotes Lord Camden, that "The discretion of a judge is the law of tyrants; it is always unknown; it is casual, and depends on constitution, temper and passion. At best, it is often caprice. In the worst it is every vice, folly and passion to which human nature can be liable."

Equally confined are the limits of public policy as defined in the most authoritative jurisdictions. According to the Supreme Court of the United States, the public policy of a state must be determined "by its constitution, laws and judicial decisions, not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public." In California, although "public policy is a term of vague and uncertain meaning, which it pertains to the law-making power to define," courts are apt to encroach on the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, "unless it contravenes some positive statute or some well established rule of law." In Pennsylvania, the view is announced that "public policy in the administration of the law by the court is essentially different from what may be public policy in the view of the legislature. With the legislature it may be, and often is, nothing more than expediency."

Though it is true that the courts have not all agreed to the definitions of public policy or of judicial discretion in the same words, and there may be found among the various jurisdictions and under different facts and surroundings which have called for the consideration of the subjects more or less divergence in the judicial definitions, these just quoted may be said to represent the weight of reputable authority, and it is safe to venture that nowhere will there be found in the exercise of judicial discretion in the past or in any judicially declared public policy any expression which may be used to justify the present disposition to reduce the judiciary from its constitutional position as a co-ordinate branch of the government to that of a mere agency for the reflection of the state of public opinion prevailing at the time.

The weakness of a system based upon elements so varying, so uncertain, and so shifting is so patent to the student of the law that the disposition lately manifested by the judges of the courts of our own jurisdiction to favor the enlargement of their personal discretion, and in numerous instances in opposition to what has heretofore been determined and accepted as the settled law of the state, is at once a subject of confusion to the profession and an index of the activity of the dangerous and subtle forces seeking the subversion of the free institutions in which we have confidently reposed our social safety. With the abolition of the forms of actions cognizable by courts of law, an unlimited relaxation of the rules of pleading, unrestricted discretion of trial courts in the admission and exclusion of evidence, together with a judiciary directly responsive to the prevailing sentiment of the moment, there would result about as complete a reproduction of the conditions which brought the procurator to wash his hands before the rabble as could be constructed of modern materials.

Justice as an artificial creation, the result of the application of previously fixed rules and principles to subsequently occurring facts, is opposed to the law of nature in that it equalizes opportunity. Its value in the development of society depends upon its certainty, that the subject may order his affairs accordingly. A condition wherein the justice of the law, instead of being fixed and certain, should rest in the conception of the moral right or wrong of an issue as viewed from some individual standpoint or as measured from some personal moral standard would be intolerable. Likewise, to oblige a judicial mind, trained by long habits of industrious application and cultivation to impersonal views of men and things, to substitute for its reasoning powers, its research and the infallible principles of truth any human measure or estimate of

the popular conviction of the justice of a particular cause would cast into the process of administration an element of such obvious disturbing force as to overturn the balance of the entire structure of the law.

There is reason for the assertion not infrequently heard that there exists more justification for complaint because of judicial departures from the plain and settled rules and precedents of the law than there is for abuses arising out of the imperfections of the law itself. Within very recent years court decisions have more strongly reflected local popular sentiment than formerly, and even in cases arousing no general public interest there is a growing tendency to measure the political, financial, or other influences of the contending parties. Such cases are within the professional experiences of every practitioner. This has encouraged the more or less general conviction of the unlearned in the law that the justice which the courts administer in strict accordance with the fixed principles of the law is archaic and antiquated.. Such conviction is erroneous. The justice of the law, as administered by the courts, even through ancient forms, is generally in advance of, and therefore to some extent, at least, likely to be out of harmony with, justice as a popular conception, and this, because the justice of the law is the product of mature minds of great natural force and special development. Public opinion may be, and most generally is, influenced in a large degree by incidents so insignificant or unworthy of confidence that they do not and ought not to enter into the determination of issues involving either public or private interest. That such a situation may result in frequent popular disappointment and disapproval of the courts proves nothing more than the commendable fidelity of the judiciary to the principles and rules and forms which constitute the safeguard of every individual against inflammatory public sentiment and unlawful violence.

We can imagine a better situation would now prevail if early in the history of American courts public sentiment had been trained to regard justice as the legitimate product of the operation of lawful processes. That whatever the result of any issue, it demanded applause and approval, not because it may have been morally right, but because it was the result produced by the operation of the law. Also that the spirit of criticism might never have grown so strong or so prevalent if lawyers and judges had at any time felt any obligation to defend the positions of the courts in decisions counter to the popular desire. As an instance, probably every newspaper in the State of Missouri has harshly criticised the Supreme Court of the state for reversing a judgment of conviction upon an indictment which omitted the last word "the" from the concluding clause "against the peace and dignity of the State." Of course the burden of the critics' song was that the word was unnecessary and that its omission was not prejudicial, and it might with equal plausibility have been argued that the entire clause is practically meaningless and serves no purpose in acquainting the accused with the nature of the charge against him. But not a lawyer or a judge in the state has raised a voice in explanation or defense of the action of the court in refusing to nullify a plain provision, although it may be a useless one, contained in the fundamental law provided by popular voice itself.

It does not follow, though, that because the laws ought to be fixed and settled and should develop through the application of certain principles rather than the resort to expediency, they may not be changed to meet changed conditions, or that the progress of civilization may not be reflected in the administration of justice. On this point there is no variety of opinion or expression, and Judge Whiting, of the Supreme Court of South Dakota recently emphasized the tendency to abandon obsolete and useless rules and doctrines in this language: "The man is blind indeed who calls out for the laws of our fathers, who even holds the fundamental laws of our land sacred; such

a one would cut his grain with a sickle, thresh it with a flail, grind it in the hollow of a rock, and still expect to fill the hungry mouths of increasing multitudes."

The reports and statutes of every American jurisdiction abound in evidences that the law interpreters and law makers have not been insensible to the need that the law should "keep even step with march of civilization," as one court expresses it, but it is a singular fact that the agencies and organs of administration of justice have, as a rule, remained in the primitive stage of pioneer days. Some indeed have wholly outlived their usefulness, while others are so encumbered with senseless adherence to ancient custom as to seriously retard their discharge of the duties required of them. Our methods of "keeping even step with the march of civilization" in this respect presents some unique features. We have been so busy building harvesting machines, threshing equipment, express trains, electric light plants, flying machines, and similar inventions that we have not had time to consider that the instruments of the administration of the law have been in use in civilized governments for well nigh onto a thousand years.

Justices of the peace were probably a necessity—a convenience, at least—in the days when the woodman was clearing the way for a pioneer civilization. When the interests of society and of industry were so few and simple that it mattered little how disputes were settled or whether settled at all, the office of justice of the peace may have been very well calculated to preserve a semblance of lawful authority and administration. Crude and primitive in itself, it ministered to a crude and primitive civilization with a tolerable satisfaction and some show of efficiency. Those were days when human habitations were far apart, when there were no highways, no telephones, no facilities nor need of facilities of either transportation or communication. Yet in these progressive days of the twentieth century, with their congested population, with their tremendous power of commerce and other enterprises, and with every possible facility of transportation and communication and the accompanying and consequent complexity of social relations, we still administer the laws which have "kept even step with the march of civilization" by this tribunal which was a mark of British stupidity before the fifteenth century.

It is a proud American boast that our civilization began where the British left off, but it is a fact that less is required in qualification for office of justice of the peace in Missouri now than was required by the statutes of Great Britain more than five hundred years ago. In the reign of Edward III it was ordained that these officials should consist of two or three of the best reputation in the county; a little later statute further provided that three or four of the most worthy men in the country, and some learned in the law, shall be made justices in every county. In the time of Richard II the qualifications required were that they should be of the best reputation and most worthy men in the county. Still later a property qualification was added.

Such was the conception of a fit agency of the administration of the law by a people who knew nothing of the art of printing, or of the use of gunpowder, or kerosene, or a steam engine, to say nothing of the wonders of modern invention which have so simplified the labors of our hands and multiplied the complexities of the regulation of social conditions.

The statutes of our own state, which we may take as a fair example of other jurisdictions, do not provide or require even that justices of the peace shall be able to read or write, or that they shall be men of good repute, or possess any knowledge of anything whatever, though it is not disputed that some of them do in fact possess some of these qualifications. The most rudimentary principles of law, as well as the commonest rules of evidence, are to them an unexplored mystery, and yet without any pretense to competency to declare the law or limit the range of evidence, they are empowered to summon jur-

ors and swear them to "a true verdict render according to the law and the evidence," apparently on a theory that the triers of fact possess qualifications which the presiding genius of the court lacks.

And even more primitive and ancient than the justice of the peace as an arm of the administration of the law is the periodic court term. More than seven hundred years ago, and history confesses it does not know how much further back, judges went about the realm of Great Britain hearing and trying cases at law. Seven years was then regarded as sufficient time for the accumulation of business of such amount and importance as to justify the visitation of the itinerant peddler of the justice of the law. The intermission was later reduced to one year in Great Britain, and in American jurisdictions it has been further reduced, but it is back to this ancient day, when ordinary individuals did not need justice and most of them did not want it, that we trace our periodic term of circuit court, by which we "keep even step with the march of civilization."

And to be sure that we do not lose this "even step with the march of civilization," we still maintain a multitude of jurisdictions. And again, as singular as it may seem, as our justices of the peace possess the merit of offering a speedy determination of a controversy, and the circuit court, lacking this virtue but possessing that other of offering a correct solution at the end of more or less trying delays, we have some other tribunals organized out of the defects of both and possessing none of the merits of either. Obviously the reference is to the probate courts and county courts, both of which are in this state constitutional courts, courts of record, and each of which has entrusted to it judicial powers far beyond its ability to correctly exercise and jurisdiction over interests beyond its qualifications to protect. Combining the incompetency and inefficiency which marks the justice's courts with the slothful processional terms of the circuit court, they are paragons of the preservation of ancient and useless institutions.

Naturally, any system which begins in incompetency and inefficiency and ends in periodic spurts of unseemly activity begets maladministration, and courts of review have become necessary monuments to the lack of equipment of the courts of first instance to direct the simple process of affording one fair and impartial trial of an issue at law.

The primitive court of justice of the peace, as to matters within its exclusive jurisdiction, has become but a stepping stone to the circuit court, which, with a generous accumulation of costs to each case, perfunctorily passes it on. Thus the justice's court is but the preparatory step for the circuit court and the circuit court but a commission to take testimony and prepare the record for the reviewing tribunal. That these tribunals of first instance should forfeit the confidence of the community is an inevitable consequence of such a line of procedure. The probate court and the county court, so far as concerns the performance of judicial functions, are accorded recognition in theory only. The courts of last resort have become overwhelmed with the burden of the labors cast upon them by the failure of the courts below to exercise their proper functions. And our communistic civilization from time to time kindly increases the number of judges and the number of courts and the conflict of decision, in "even step with the march of civilization."

The situation here portrayed is not overdrawn. And it must be considered in connection with a cost system that excludes the weaker subject from the protection, at least, of the courts of last resort. Justice is abundantly free to the man who is able to pay for it, and he alone may avail himself of it.

A high percentage of the cases reviewed in courts of final appeal are reversed, and a second or third trial is made necessary to secure a correct application of the law to the facts in the record. This weakness is

well calculated to alarm the lay mind and shake its confidence in the courts and the law, and when the further fact is considered that a high percentage of these reversals result from departures from elementary principles or the doctrines of previously adjudicated points, the matter becomes one of anxiety to the practitioner, under whose observation impecunious litigants or those whose causes do not justify the expenditure of costs entailed by appeals to courts of review must suffer the most flagrant wrongs in the forum whose first office is their protection.

These views lead to the conclusion that the most urgent need is such a reorganization of our judicial system as will provide prompt and correct results in the courts of first instance. It is the sheerest mockery that a party whose dispute involves insignificant money values should be obliged to first submit his cause to the determination of a tribunal professedly unfit and unqualified to perform that duty. The first object of government and of civilization and of law is to protect the weak against the strong, and it would seem nothing less than consistency with that object that the humbler subject should find access to the same dispensation of justice that is afforded his more powerful fellow-man. And it is equally inexcusable that an appeal to a competent tribunal should involve such a delay and entail such loss of time as to render application thereto impractical or impossible. Courts of review may be considered as necessities, out of an abundance of caution against abuses and weaknesses always likely to result from human fallibility, but their existence offers no excuse for a studied departure from elementary principles or doctrines of previously decided cases.

The suggestion is here repeated that one court of general jurisdiction, in practically continuous session, provided with process returnable in from ten to thirty days from issue, could well perform all the judicial functions of all the justices of the peace, the probate court, and the county court of each county in the rural sections of this state, as well as the transaction of the greater part, if not all, of the business now falling within the exclusive original cognizance of the circuit court.

Such a court, provided with not less than two competent judges sitting together, could afford an actual determination at law of every cause without vexatious delay, and it is believed would practically preclude the suspicion of partisanship and bias that frequently aggravates the dissatisfaction of the losing party; an opinion concurred in by two competent judges would also be entitled to greater public confidence and would be less likely to be appealed from than the decision of a single judge, because an agreement of two trained minds upon any point is more likely to be correct than the opinion of either alone. By continuing the present scheme of circuit court, the judge to sit with the two judges of the county as umpire in trials *de novo*, or by converting the circuit court into either a court of review or as an intermediary to grant appeals on prima facie showing of error, an efficient check against abuses growing out of local influences might be provided, and the work of the courts of last resort would be reduced to the minimum. Nothing less than some acceptable plan of providing correct trials in the courts of original jurisdiction will reduce the labors of reviewing courts, and nothing less than this ought to do so.

No consideration has been given to the fact that there may be some popular opposition to the abolition of the crude inferior courts to which the inhabitants have become accustomed, for the reason that this discussion has been directed rather more toward the agitation for reform of the law than to presenting feasible suggestions for reform of the courts. It is submitted, however, that in the present state of popular education no strenuous objections would be offered to the discontinuance of the probate court; in fact there would seem to be no more reason for a separate probate jurisdiction than for a separate equity jurisdiction. The county court's duties are largely ministerial. Its few judicial functions, though

important, could readily be separated from the fiscal and placed in competent hands.

It is believed that such a system as has been suggested would, aside from its first purpose of granting prompt and adequate determination of litigated controversies, result in the speedy relief of the congested dockets of the Supreme Court and courts of appeal, following which the reduction of the number of appellate courts would be a matter of time only. Doubtless there would arise many matters of detail to be considered from time to time, and it is hardly to be expected that such a scheme could be adopted in such perfect shape in the beginning that adjustments need not thereafter be required. Probably other means of accomplishing the results here indicated as desirable have suggested themselves to the bar and bench, which upon presentation and examination will be found more likely to prove effective. At any rate, in view of the existing unreserved criticism of the courts and the unsettled state of public confidence in the law there is perhaps offered a very present opportunity to perform a high public service by directing the course of popular sentiment toward a more perfect judicial system and away from the one apparently absorbing idea that the revolutionary abolition of sound principles of law and government is necessary to maintain the law in "even step with the march of civilization."

J. D. GUSTIN.

Salem, Mo.

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## GOOD WILL—SALE OF BUSINESS.

**RAPALEE, et al. v. JOHN MALMQUIST & SON, et al.**

Supreme Court of Iowa. Feb. 12, 1914.

145 N. W. 279.

A contract by which a partnership sold its stock of goods and good will, and, as a part of the consideration for the purchase price, agreed that the partnership would not directly or indirectly engage in the same business in the future in the same city, did not bind the individual members of the partnership not to so engage in such business, since such contracts in restraint or partial restraint of trade are not favored, and will be strictly construed.

PRESTON, J. At and prior to the time of the making of the contract in question, about January, 1905, there were three separate concerns engaged in the marble business in Sioux City. They were D. W. Rapalee, M. C. Carlstrom & Co., and John Malmquist & Son. The two first named, and who are plaintiffs herein, claimed that the other was doing a dishonorable business, because it was cutting prices, and they concluded to purchase the business of defendants. This they did, paying for the business about $2,200, each of the two concerns so purchasing paying one-half; and after the purchase they divided the property.

The contract was signed by John Malmquist & Son, a partnership, the members of which were John Malmquist and John Malmquist, Jr. The purpose was to lessen competition. The evidence of plaintiffs is that there was such competition with the three that there was no money to be made, and "we were buying out Malmquist & Son to lessen that competition. It was to stop this competition."

The provisions of the contract are, in substance: "That John Malmquist & Son sells to D. W. Rapalee and M. C. Carlstrom & Company, jointly, their stock of marble and granite goods and the good will for $2,259, and that as a part of the consideration for the purchase price that said John Malmquist & Son will not directly or indirectly engage in the marble and granite business in Sioux City in the future." And the firm name was signed, "John Malmquist & Son."

Authorities are cited by appellants on the general proposition that contracts of this nature are enforceable. Appellees contend that the contract does not purport to bind the individual members of the firm, and that they are not bound. Such contracts in restraint, or partial restraint, of trade are not favored, and will be strictly construed. Haldeman v. Simonton, 55 Iowa, 144, 7 N. W. 493; Streichen v. Fehleisen, 112 Iowa, 612, 84 N. W. 715, 51 L. R. A. 412.

We think this case is ruled by the Streichen case, supra. The firm or partnership did not engage in such business after the contract was executed, and that was the contract, that the firm should not do so. The contract might have been so drawn as to cover the individual acts of each partner; but it does not do so. See, also, Barron v. Collenbaugh, 114 Iowa, 71, 86 N. W. 53.

There are cases in other jurisdictions not in harmony on the question; but the holdings of this court on the subject seem to be settled. The fact that this contract provides that said John Malmquist & Son will not directly or indirectly engage in such business does not change the rule, because it is the firm which is not to engage in the business directly or indirectly.

After defendants had sold out, the senior Malmquist went away from Sioux City for two or three years, and the junior went into other

business for a time, and then went away. In May, 1910, John Malmquist, Jr., commenced the monument business again. In three or four months he sold out to his brother, Charles, who conducted the business under the name of the Western Marble & Granite Works. Charles is not a party to this action. He was carrying on the business when this action was brought in April, 1912. The senior Malmquist worked for John, Jr., a part of the time at $15 per week when he worked. John, Jr., worked for Charles at a salary of $25 per week.

It is not established by the evidence that the Malmquists, or any of them, were in partnership after the execution of the contract. John, Jr., had sold out the business a year or two before this action was brought. The evidence does not show that plaintiffs were damaged. Other questions are argued; but what we have said disposes of the case.

The judgment and decree of the district court is affirmed.

LADD, C. J., and EVANS and WEAVER, J. J., concur.

NOTE.—*Agreement by Selling Firm Not to Engage in Similar Business.*—The case of Streichen v. Felheisen, 112 Iowa 612, 84 S. W. 715, 51 L. R. A. 412, was where the sale and agreement was signed by the parties in their individual names and it was said the manner of their signing could in no way change or modify their obligations, as the paper showed this was a joint contract. This case, therefore, strongly supports the principal case.

But that it is a joint contract or covenant has been said not to be conclusive of the question Thus Alvey, C. J., said: "There can be no question but that the covenant sued on is by its terms, a joint covenant, and not joint and several. But does it follow that it requires the joint act of both defendants in order to constitute a breach of this covenant? A joint covenant does not necessarily mean a joint act to incur liability under it. The covenant is not 'that the party' shall not as partners, and only as partners, enter into the retail grocery business, but they jointly obligated themselves that they will not enter into such business. They ceased to be partners from the time of selling out their business to the plaintiff. To say that there could be no violation of the covenant except by the joint acts of the defendants as and in their character of partners would seem at once to deprive the plaintiffs of all substantial benefit and protection of the covenant by reason of the easy manner in which it could be evaded. . . . The authorities seem to be clear to the effect that any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the performance of the thing contracted to be done." Love v. Stidham, 18 App. D. C. 306, 53 L. R. A. 397.

In Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 289, there was a sale of a mill by partners and joint stipulations not to engage in the business of milling in a prescribed vicinity after a certain date. It was held that this prohibited any one or all the vendors taking stock in or helping to organize or manage a corporation to compete with the purchasers.

In Boutelle v. Smith, 116 Mass. 111, a sale by partners was held to prevent one of them engaging as a clerk with a third person in a competing business, the court saying: "The acts of one of the defendants offered to be proved at the trial were a clear breach of their joint obligation," citing Angier v. Webber, 14 Allen 211, 92 Am. Dec. 748. See also Western Dist. Warehouse Co. v. Hobson, 96 Ky. 550, 29 S. W. 308.

In Raymond v. Yarrington, 96 Tex. 443, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 915, there was reliance on Welsh v. Morris, 81 Tex. 159, 16 S. W. 744, where the agreement was signed in the name of the partnership and it was held, that this forbade either partner to violate the joint covenant, and it was sought to distinguish the case before the court by the fact that it was signed by each of the partners, but the court though the two cases could not be distinguished.

It would seem, therefore, that the narrow question here annotated is ruled generally the other way, than in the instant case, and this would seem to be in accord with the spirit of getting away from technicality, and to give to parties contracting for a benefit something tangible in that regard. C.

## ITEMS OF PROFESSIONAL INTEREST.

### RELIGIOUS DISABILITIES AND THE WOOLSACK.

**"The Lord Chief Justice of England is the first member of the Jewish faith who has fought his way to that high office of state, and his co-religionists may well be proud of his success. But a remark made by Lord Reading himself, at the recent banquet of the Maccabean Society given in his honor, to the effect that even the office of the Lord Chancellor is open to Jews, seems to be an unduly positive pronouncement on a very doubtful matter. The better opinion, as expressed in Lord Halsbury's Laws of England (Vol. VII, p. 56), seems to be that neither Roman Catholics nor Jews have as yet been wholly relieved by law from the ancient disabilities which debarred them from aspiring to the Woolsack. That disability is of a different kind in the case of Jews from that which affects adherents of the Roman faith. Jews were under common law disabilities, civil and religious, and such disabilities—like those of women, minors, and aliens—remain until expressly removed by an Act of Parliament. Now no statute can be named which removes expressly or even by necessary implication, this disability in the case of Jews. The Religious Disabilities Act of 1846 does not do so. Section 2 merely provides as follows:**

"That from and after the commencement of this Act His Majesty's subjects professing the Jewish religion, in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, shall be subject to the same laws as Her Majesty's Protestant subjects dissenting from the Church of England are subject to, and not further or otherwise."

This section has obviously a very limited scope. And although both Houses of Parliament have now admitted members of the Jewish faith, a practice followed by the Bar and other liberal professions, it does not follow that there exists a right on the part of Jews to become Keepers of the King's Conscience. The disabilities of Roman Catholics, one need hardly say, are not due to the Common Law; they were the creation of statutes repealed by the Roman Catholic Relief Act, 1829. That statute, in rather roundabout language, it is true, but clearly enough for all practical purposes, exempted from its operation the office of Lord High Chancellor; and later statutes, such as the Statute Law Revision Act of 1863 (which repealed the Test Act, 1672), and the Test Abolition Act of 1867, cannot be said to do so in unmistakeable terms. Whether or not these disabilities in the case of Jews and Roman Catholics exist in statute law, however, the opinion of most constitutional lawyers, we fancy, would be that the appointment of either a Catholic or a Jew to the Woolsack would infringe constitutional custom and convention."—The Solicitors' Journal, London.

## BOOKS RECEIVED.

Landmarks of a Lawyer's Lifetime. By Theron G. Strong, of the New York Bar. Price, $2.50. New York. Dodd, Mead & Co., 1914. Review will follow.

Black on Bankruptcy. A treatise on the law and practice of bankruptcy, under the Act of Congress of 1898. By Henry Campbell Black, author of Black's Law Dictionary, and of Treatises on Judgments, Constitutional Law, Interpretation of Laws, Judicial Precedents, Income Taxes, Intoxicating Liquors, Tax Titles, etc. Price $9.00. Kansas City, Mo. Vernon Law Book Company, 1914. Review will follow.

The American Digest, annotated. Key-number Series, Vol. 16. Continuing without omission or duplication the Century Edition of the American Digest, 1658 to 1896, and the Decennial Edition, 1897 to 1906. A Digest of all Current Decisions of all the American Courts, as Reported in the National Reporter System, the Official Reports, and elsewhere, from February 1, 1913, to June 30, 1913, and Digested in the Monthly Advance Sheets for March, 1913, to and including July, 1913. (Nos. 270-274) Prepared and edited by the editorial staff of the American Digest System. Price, $6.00. St. Paul. West Publishing Co., 1914. Review will follow.

## HUMOR OF THE LAW.

"Say, Tom," said Jack, "did you know that Bill is going to sue the company for damages?"

"No, you don't say!" was the answer. "Wot did they do to 'im?"

"Why," explained Jack, "they blew the quittin' whistle when 'e was carryin' a 'eavy piece of iron, and 'e dropped it on 'is foot."

Rev. J. Henning Nelms, rector of the Church of the Ascension, was a Virginia lawyer before he became a minister. One of his favorite anecdotes of the Virginia police court relates to an old-time darkey who was hauled up before the judge for stealing a hen.

Rastus sat throughout the trial without paying a bit of attention to the arguments of the prosecuing attorney, or to his own defense, for that matter, and was "miles away," so to speak. The judge wanted to be easy on the old man, for it was his first offense, and during the course of the argument, while the old man was dreaming away unmindful of what was going on around him, the judge asked:

"Rastus, do you drink?"

Rastus immediately was all attention.

"Jedge," said he, "can I ax you is dat an inquiry or an invitation?"—Cleveland Plain Dealer.

Of all forms of unconscious humor, says the Law Student's Helper, none, perhaps, is more genuinely amusing than the anti-climax of men who feel it their mission to be eloquent. This pecular form of ridiculous speech prevails everywhere, especially among the officials of rural districts in this country. The following is an instance:

A police justice in a Southwestern State was trying to impress upon a prisoner who was to testify in his own behalf the solemn nature of an oath. Assuming his most pompous, Dogberry-like air, the magistrate thus addressed the man in the box:

"In taking this solemn oath to tell the truth, the whole truth, and nothing but the truth, take care that you do not allow yourself to be tempted to commit an awful purjury. Remember that the eyes of an allseeing Providence and the village constable are upon you!"

Another legal light, in a crude but ambitious town of the Northwest, had occasion, or thought he had, to comment severely upon the heinous offense of horse stealing. Accordingly he thundered forth, "For century after century the dread command, 'Thou shalt not steal!' has rolled along the ages. It is, moreover, a standing rule of our progressive court and soon-to-be-incorporated city."

## WEEKLY DIGEST.

**Weekly Digest of All the Current Opinions of All the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. **Assignments**—Future Earnings.—A person who has contracted to perform specified work may assign his claim for the compensation before the work has been completed.—Leonard v. Farrington, Minn., 144 N. W. 763.

2. **Bankruptcy**—Building Contract.—Relative to the question of certain creditors of a bankrupt contractor being entitled to priority as having filed notices of lien within 30 days of completion of a building, the bankrupt's trustee is bound by the agreement of the contractor and building owner in extending time for the completion.—Harrison v. Knafle, Tenn., 161 S. W. 1003.

3.——Husband and Wife.—A husband's bankruptcy did not deprive his wife of her rights by descent, under the statute, in the bankrupt's realty.—Haggett v. Jones, Me., 89 Atl. 140.

4.——Taxes.—Where a certified check for taxes against mortgaged property of the bankrupt was given to the city tax collector in payment of the taxes, and was received by him as such to prevent his bidding at a foreclosure sale, it constituted a satisfaction of the taxes, and precluded the city from establishing a claim therefor against the bankrupt's personal assets.—City of Pittsburgh v. South Side Trust Co., U. S. C. C. A., 208 Fed. 984.

5. **Bills and Notes**—Bona Fide Holder.—Where a bank discounts negotiable instruments for a depositor who is not in its debt, and gives him credit for the proceeds, it is not a bona fide holder for value, unless beyond the mere credit some other valuable consideration passes, such as the payment of checks drawn upon the deposit or the application of the deposit to some obligation of the depositor.—German-American Nat. Bank v. Lewis, Ala., 63 So. 741.

6.——Burden of Proof.—Mere want or failure of consideration for a note sued on by an indorsee, not coupled with negotiation in breach of faith, or under such circumstances as to amount to a fraud, does not constitute defective title so as to change the burden of proof of bona fide holder.—Hill v. Dillon, Mo., 161 S. W. 881.

7.——Gift.—Under Negotiable Instruments Law, a wife who received a note from her husband as a gift was not a bona fide purchaser.—Greer v. Orchard, Mo., 161 S. W. 875.

8.——Holder for Value.—In an action by the innocent holder of a note, it was no defense that the payee was a partnership which had failed to file a proper certificate pursuant to Pub. Acts 1907, No. 101.—Pontiac Sav. Bank v. Reinforced Concrete Pipe Co., Mich., 144 N. W. 486.

9.——Surety.—An accommodation indorser is a surety, and equally bound with the maker to pay the note when it became due.—Havlin v. Continental Nat. Bank of St. Louis, Mo., 161 S. W. 741.

10. **Carriers of Goods**—Freight Charges.—As a rule a consignor with whom a contract of shipment is made is impliedly liable for the freight charges, irrespective of whether he is owner.—Chicago, R. I. & G. Ry. Co. v. Floyd, Tex., 161 S. W. 954.

11. **Carriers of Passengers**—Baggage.—A carrier's duty to provide a safe place for the delivery of baggage to passengers at their destination cannot be delegated, either to an employe, or to an independent corporation having charge of the terminal station.—Johnson v. Florida East Coast Ry. Co., Fla., 63 So. 713.

12. **Chattel Mortgages** — Conversion.—Whoever, with actual constructive notice of the chattel mortgage, is directly or indirectly the instrumentality through which a conversion of mortgaged property is brought about is liable for the conversion.—Nunn v. Padgitt Bros. Tex., 161 S. W. 921.

13.——Subsequently Acquired Property.—A chattel mortgage upon property not in existence may become operative if the property covered subsequently comes into the possession of the mortgagor, on the equitable principle of estoppel rather than on the principle that the execution of the mortgage then creates a valid lien upon the thing mortgaged.—Ivy v. Pugh, Tex., 161 S. W. 939.

14. **Contracts**—Consideration.—An agreement not to exercise a legal right is a sufficient consideration to support a contract.—Brinkley v. Car Works & Mfg. Co. v. Cook, Ark., 161 S. W. 1065.

15.——Performance.—Where a contract for the construction of an irrigation dam provided that it should extend down to impervious material, but the plans indicated the limit of the depth, the construction company was not responsible for the failure of the dam because the depth was subsequently discovered to be insufficient.—Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co., U. S. C. C. A., 208 Fed. 976.

16.——Rescission.—Statement by defendants that they would not be bound by the contract held not to operate as a valid rescission; plaintiffs not being restored to their former position.—Clapp v. Gilt Edge Consol. Mines Co., S. D., 144 N. W. 721.

17. **Corporations**—Estoppel.—Where a manufacturing company authorized a person to em-

ploy a sales agent and accepted the benefit of the services of the agent employed, it was estopped to claim that the employment was made without its authority—Fuchs v. Standard Thermometer Co., Mich., 144 N. W. 484.

18.——Slander.—A corporation may be liable for slander.—Nunnamaker v. Smith's, S. C., 80 S. E. 465.

19.——Sole Owner of Stock.—Where one owns all the stock, the corporation is bound by his acts in reference to corporate property.—Cotten v. Tyson, Md., 89 Atl. 113.

20. **Covenants** — Restrictions.—Where the property in a residence subdivision in which many expensive homes had been erected was subject to a covenant restricting lot owners from constructing buildings other than residences for one family, that there had been one breach of the covenant does not show such a change in the character of the neighborhood as to warrant a lot owner in constructing flat buildings.—Misch v. Lehman, Mich., 144 N. W. 556.

21. **Criminal Law**—Judicial Notice.—Judicial notice will be taken that the use of tobacco in any form by the young is injurious, and that snuff is especially so.—State v. Olson, N. D., 144 N. W. 661.

22.——Pedigree.—A copy made from entries in a family Bible containing the date of the birth of prosecutrix held admissible on a trial for her seduction to establish her age; proof having been made of the correctness of the copy and of the worn condition of the Bible.—State v. Bruton, Mo., 161 S. W. 751.

23.——Silence.—Testimony of the sheriff, who received defendant from the chief of police, that the chief also turned over some burglars' tools, and said they were found on the defendant, is inadmissible; it not being shown defendant had his attention called to this, but merely that he "stood there" and said nothing.—People v. Courtney, Mich., 144 N. W. 568.

24. **Damages**—Minimizing.—A party who is damaged by the wrongful act of another should take all reasonable precautions to protect his property and minimize his damages.—Weller v. Missouri Lumber & Mining Co., Mo., 161 S. W. 853.

25.——Nominal.—If defendants' liability for breach of contract is shown, plaintiff is entitled to at least nominal damages.—Crosby v. Plummer, Me., 89 Atl. 145.

26. **Death**—Evidence.—In an action for wrongful death, evidence that deceased could not obtain life insurance because of his health is admissible as a circumstance bearing on the value of his life.—Nicoll v. Sweet, Iowa, 144 N. W. 615.

27. **Dedication**—Acceptance.—If the tract dedicated as a street is clearly defined as by a map, and the public use is practically of the whole tract dedicated, it is presumed that an act accepting a part of the tract dedicated is an acceptance of the whole.—Doyle v. City of Chattanooga, Tenn., 161 S. W. 997.

28. **Deeds**—Delivery.—Where a grantor places the deed in escrow, retaining no dominion over it, a valid delivery is made, even though the depositary is directed not to deliver the deed until the grantor's death.—Loomis v. Loomis, Mich., 144 N. W. 552.

29.——Fee.—A conveyance "unto J. and her children * * * for her and her children alone absolutely * * * to have and to hold * * * unto the said J., her heirs and assigns forever," and binding grantor to warrant and defend the premises "unto the said J., her heirs and assigns," held to convey the fee simple to J.—McCollough v. Spencer, S. C., 80 S. E. 466.

30. **Descent and Distribution**—Warranty of Ancestor.—While a husband at common law was liable on his warranty in a deed made by him and his wife conveying her land, an heir of the husband is not liable on the covenant of warranty by reason of advancements.—Armor v. Frey, Mo., 161 S. W. 829.

31. **Divorce**—Public Policy.—Any agreement for divorce, or any collateral bargaining promotive of it, is void.—McDonald v. McDonald, Mo., 161 S. W. 850.

32. **Equity**—Mortgage.—A real estate mortgage securing a just debt will not be canceled at the suit of an assignee standing in the mortgagor's place merely because foreclosure is barred by limitations.—Keller v. Souther, N. D., 144 N. W. 671.

33.——Unclean Hands—Where plaintiff in a suit to rescind an exchange of property was defrauded, he was not barred from relief in equity on the theory that his hands were unclean because he overvalued his property in the exchange.—Schroeder v. Turpin, Mo., 161 S. W. 716.

34. **Estoppel**—Office of.—"Estoppel" is not a conveyance of title. Its office is to prevent denial by one affected by it, not to affirmatively transfer title.—Coursey v. Coursey, Ga., 80 S. E. 462.

35.——Subsequently Acquired Property.—Where land was voluntarily conveyed to a county for county seat purposes, title to the property subsequently acquired by the grantors inured to the benefit of the county.—Schuman v. George, Ark., 161 S. W. 1039.

36. **Evidence**—Certified Copy.—Where a deed is not attested so as to authorize its record, a certified copy thereof is inadmissible in evidence, though the deed be physically recorded.—Turner v. Neisler, Ga., 80 S. E. 461.

37.——Parol Agreement.—A parol collateral agreement which has become executed may be shown to explain the transaction in which the collateral agreement was executed.—Richards v. Hodges, N. C., 80 S. E. 439.

38. **Executors and Administrators**—Infant.—An infant improperly appointed administratrix is an administratrix de facto, and her acts are valid, and the appointment cannot be collaterally assailed.—Tomblin v. Peck, W. Va., 80 S. E. 450.

39.——Joint Conveyance.—Where only one of two executors joined in conveying land in accordance with an order of sale by the court of ordinary, the conveyance was inoperative and did not pass title.—Armor v. Frey, Mo., 161 S. W. 829.

40.——Land.—Where the executor with power to sue under a will, bequeathing testator's interest as mortgagee, takes title to mortgaged land in satisfaction of the debt, he holds it as

personalty and may sell it without order of court.—Battey v. Battey, Neb., 144 N. W. 786.

41.——Law of Forum.—Where an administrator is appointed by the courts of one state, such courts reserve to themselves full and conclusive jurisdiction over the assets of the estate within the limits of that state.—Bank of Corning, Ark., v. Dowdy, Mo., 161 S. W. 859.

42. **Exemptions**—Head of Family.—Ordinarily, where a widow keeps a homestead with an adult child, she is deemed the head of the family, but if she yield this right to one of the sons, and he becomes the head, he may by virtue of the relation claim exemptions as if the head of a family of his own.—Blair v. Fritz, Iowa, 144 N. W. 611.

43. **False Imprisonment**—Action for.—If it was not lawful for a young girl to enter a public dance hall as an invited guest, she could, irrespective of her age recover damages if defendant police officer, by physically restraining her, or arresting her, prevented her from entering the dance hall on the ground that she was not eighteen years of age.—Cullen v. Dickenson, S. D., 144 N. W. 656.

44. **Frauds, Statute of**—Collateral Contract.—A promise by a third person to pay the pre-existing debt of another founded on the original liability, without any new consideration to support it, is a collateral undertaking.—Brinkley Car Works & Mfg. Co. v. Cook, Ark., 161 S. W. 1065.

45.——Subscription to Stock.—A subscription to take a certain number of shares of stock in a corporation to be organized was not within the statute of frauds, relating to the sale of personalty for a price exceeding $50, and hence authority to make such contract need not be in writing under section 1667.—Clapp v. Gilt Edge Consol. Mines Co., S. D., 144 N. W. 721.

46. **Fraudulent Conveyances**—Adequate Consideration.—Though a grantee acted in good faith, a conveyance to him by an insolvent grantor was invalid as to creditors if the grantee did not pay an adequate consideration.—Haggett v. Jones, Me., 89 Atl. 140.

47.——Equity.—If land was purchased with another's money under an arrangement with the latter for the purpose of defrauding his creditors, equity would not raise a trust in the land in favor of the person who actually furnished the money.—Boothe v. Cheek, Mo., 161 S. W. 791.

48.——Grantee.—Where a debtor sells property to hinder or delay his creditors, the purchaser will not be protected as a purchaser in good faith as to purchase money not paid or placed beyond his control prior to his notice of the intended fraud.—Raapke v. Beacom, Neb., 144 N. W. 815.

49.——Participation by Grantee.—An insolvent's conveyance of his property with intent to prefer some creditors and defeat others will not be sufficient to authorize the court to set it aside, unless the grantee participated in the fraud.—Flood v. Bollmeier, Iowa, 144 N. W. 579.

50. **Garnishment**—Transfer.—Where a debtor gave to his wife money to pay rent and she deposited it in the bank in her own name and gave a check on the account to the landlord for an amount in excess of the deposit, but before the check was presented the account was garnished, the rights of the landlord were superior as to such deposit to the garnishing creditor.—Burns & Bell v. Lowe, Tex., 161 S. W. 942.

51. **Homicide**—Cause of Death.—Where decedent was thrown from defendant's automobile and injured and died of delirium tremens, an instruction, in a prosecution for manslaughter, that if the injuries received caused the delirium tremens which caused decedent's death, and the delirium tremens would not have occurred or caused his death if the wounds had not been received from the fall, they should find defendant guilty was proper.—State v. Block, Conn., 89 Atl. 167.

52. **Husband and Wife**—Agency of Husband.—A husband, who with the consent of his wife acts as her general agent in the management of her real estate, is a general agent and may contract with owners of other lands for the joint drainage of all the lands.—Irwin v. Hoyt, Iowa, 144 N. W. 584.

53.——Community Property.—Where a husband conveyed one-half of the community property of himself and wife to their infant child, the rights of the parties, upon the death of the child intestate and without issue, are the same as if no conveyance had been made.—Gutheridge v. Gutheridge, Tex., 161 S. W. 892.

54.——Estate of Entireties.—A wife had no interest in land owned by her and the husband by the entireties which she could, by her sole act, incumber, and hence a quitclaim deed by her did not give the grantee an equitable lien on the land for the amount paid by him.—Ernst v. Ernst, Mich., 144 N. W. 513.

55.——Joinder of Wife.—Where a wife joined with her husband in executing a power of attorney to convey land in which her husband had a life estate, and the power clearly showed that she had no interest in the land except as wife, her execution did not carry with it her contingent remainder in the land given by the will of her father-in-law.—Armor v. Frey, Mo., 161 S. W. 829.

56. **Insurance**—Accident Policy.—Under an automobile accident policy, providing that insurer would defend any suits against insured on account of automobile accidents, the insurer was not required to defend a criminal proceeding.—Patterson v. Standard Accident Ins. Co., Mich., 144 N. W. 491.

57.——Advanced Premium.—An applicant for a life insurance cannot recover an advanced premium, where he has refused to submit to a medical examination provided for by the application and requested by the company, unless the contract has been rescinded.—Witt v. Old Line Bankers' Life Ins. Co., Neb., 144 N. W. 801.

58.——Assignment.—A pre-existing indebtedness constitutes a sufficient consideration for an assignment of the proceeds of an insurance policy.—Kaus v. Gracey, Iowa, 144 N. W. 625.

59.——Delivery.—Agents of insurer, receiving a policy for delivery if insured was in good health, held not agents of insured to accept delivery of the policy for him, and, he having died prior to an actual delivery, the policy never was in force.—Bowen v. Prudential Ins. Co. of America, Mich., 144 N. W. 543.

60.——Stipulation.—An express stipulation, in an application for insurance, made in this state, that the contract and the policy should be construed according to the law of New York held a stipulation which the parties were competent to make.—Williams v. New York Life Ins. Co., Md., 89 Atl. 97.

61.——Suspension of Policy.—The violation of the condition in an application for a life policy which provided against insured engaging in ex-

tra hazardous occupations for one year held only to suspend the policy which was revived at the expiration of the year.—Edmonds v. Mutual Life Ins. Co. of New York, S. D., 144 N. W. 718.

62. **Judgment** — Ejectment.—In ejectment, where the land sued for is held in separate possession by different defendants, the plaintiff may be compelled to elect against which he may proceed, but where such election is not required, judgment may be rendered against each defendant.—Norton v. Reed, Mo., 161 S. W. 842.

63.——Excessive Amount.—A judgment in excess of the amount claimed is improper and will be reversed.—Weller v. Missouri Lumber & Mining Co., Mo., 161 S. W. 853.

64.——Faith and Credit Clause.—Where judgment was recovered against an ancillary administrator, the refusal of the court having charge of the domiciliary administration to permit the enforcement of the judgment against the estate was not a violation of the full faith and credit clause of the United States Constitution.—First Nat. Bank of Corning, Ark., v. Dowdy, Mo., 161 S. W. 859.

65.——Non Obstante Veredicto.—Judgment non obstante veredicto is permissible only when there is undisputed evidence, outside of the facts found by the jury, on which a verdict should have been directed.—Mixon v. Wallis, Tex., 161 S. W. 907.

66.——Non Obstante Veredicto.—A judgment notwithstanding the verdict is rendered upon the admissions of the pleadings and not upon the evidence, and such a judgment for defendant was improper where his pleadings consisted solely of denials of the complaint.—Streitweiser v. Lightbourn, Conn., 89 Atl. 186.

67. **Landlord and Tenant**—Implied Covenant. —There is no implied covenant by the landlord that the premises are in good repair when let. —Wilt v. Coughlin, Mo., 161 S. W. 888.

68. **Libel and Slander**—Innuendo.—The function of an innuendo in an action for libel is to point out the meaning which plaintiff claims to be the true meaning of the libelous language, and is required where the language is ambiguous, whether the ambiguity is patent or latent.—Skelley v. St. Louis & S. F. R. Co., Mo., 161 S. W. 877.

69.——Responsibility.—A person is responsible for the publication of a libel in so far as it is the natural, or reasonably to be anticipated, result of his act, but is not responsible for an independent subsequent publication of a similar libel not induced by his act.—Bigley v. National Fidelity & Casualty Co., Neb., 144 N. W. 810.

70. **Malicious Prosecution**—Probable Cause. —In determining whether there was probable cause for a prosecution, the facts must be considered in the light in which they appeared to the parties charged with maliciously instituting the prosecution, when the prosecution was instituted.—Chapman v. Nash, Md., 89 Atl. 117.

71. **Mandamus**—Restoratibn to Office.—Mandamus will lie to restore one legally entitled to an office from which he is ousted by a mere usurper but not where the occupant is not under color of title.—State v. Clark, Conn., 89 Atl. 172.

72. **Master and Servant**—Assumption of Risk. —Plaintiff, in piling structural iron on a specified foundation, held to have assumed the risk of injury from any unfitness therein which was as apparent to him as to his employer.—Miller v. Hart-Parr Co. of Charles City, Iowa, 144 N. W. 589.

73.——Continuance of Relation.—Where the Master sells his business, but no actual change takes place in the management, and the servants are in no way informed of the transfer, the relation continues for a reasonable time, the same as though no sale or transfer had taken place.—Benson v. Lehigh Valley Coal Co., Minn., 144 N. W. 774.

74. **Mechanics' Liens**—Completion of Contract.—Under a building contract, including the installing of a sprinkler system, to be approved by the State Inspection Bureau, the building is not completed, as regards the time for filing notice of lien, till the work required by the bureau on its inspection is done.—Harrison v. Knafle, Tenn., 161 S. W. 1003.

75.——Sale of Property.—On foreclosure of a mechanics' lien on an irrigation system, it was proper for the court to order the system sold as a whole without right of redemption, the property being so blended and reciprocal in its use that to divide it would destroy or greatly impair its value to the detriment of public and private interests.—Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co., U. S. C. C. A., 208 Fed. 976.

76. **Money Received**—Action for.—If plaintiff show that he owned a note and defendants wrongfully converted it by demanding and receiving payment, he makes out a case for money had and received.—Lee v. Coon Rapids Nat. Bank, Iowa, 144 N. W. 630.

77. **Monopolies**—Anti-Trust Act.—A combination in violation of the anti-trust law statute is void, irrespective of the common law distinction between reasonable and unreasonable restrictions on trade.—Crandall v. Scott, Tex., 161 S. W. 925.

78. **Mortgages**—Assumption of Risk.—Delivery of a deed mortgaged premises containing a clause obligating the grantee to assume the mortgage debt and recording thereof held insufficient to charge him with an agreement to assume it.—Raffel v. Clark, Conn., 89 Atl. 184.

79.——Notice from Possession.—Complainant's possession of the premises, eight days after their recorded deed to B. was made, was not notice to defendant, then making a loan to B. on the security of the premises, of any rights of complainants inconsistent with their deed.—McEwen v. Keary, Mich., 144 N. W. 524.

80. **Negligence**—Emergency.—In a situation causing fright or involving an element of expected danger suddenly appearing, one is not held to the same degree of judgment as would otherwise be required; the question depending on all the circumstances included in the immediate situation.—Stokes v. Sac City, Iowa, 144 N. W. 69.

81.——Licenses.—The owner of uninclosed land need not make it safe for pasturage and is not liable for injuries to stray cattle by falling into excavations thereon.—Wilt v. Coughlin, Mo., 161 S. W. 888.

82. **Parent and Child**—Necessaries.—The right of a stranger to furnish necessaries to a minor at the expense of the father is limited to cases where there has been an express promise by the father to pay therefor, where the father has failed to provide such necessaries or where some special exigency exists.—Sassaman v. Wells, Mich., 144 N. W. 478.

83. **Railroads**—Easement.—A railroad company cannot grant to the landowner an easement in a private way over its tracks.—Lincoln v. Great Northern Ry Co., N. D., 144 N. W. 713.

84. **Reformation of Instruments**—Mutual Mistake.—Where the parties to a deed of trust admitted that by inadvertence there was a misdescription in the real estate intended to be conveyed by the grantors and received by the beneficiary, there was a mutual mistake of the parties justifying reformation.—Wolz v. Venard, Mo., 161 S. W. 760.

85. **Release**—Misrepresentation.—Where the release of a claim for a personal injury was obtained on the representation that only a railroad company was released, a telegraph company could not rely on the release which in fact discharged all companies because of the failure of the person injured and her husband to read the release before signing.—Western Union Telegraph Co. v. Walck, Tex. Civ. App., 161 S. W. 902.

86. **Trusts**—Mingling Funds.—When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the equitable right of the cestui que trust ceases.—Gault v. Hospital for Consumptives of Maryland, Md., 89 Atl. 105.

87. **Wills**—Invalidity.—A will which is so vague that the court cannot by reasonable rules of construction determine testator's intent is void.—Griffith v. Witten, Mo., 161 S. W. 708.

88. **Work and Labor**—Apportionment.—Recovery can be had for work done and material furnished under a broken contract to complete a railroad only when the contract is apportionable.—Dillon & Harrison v. Suburban Land Co., W. Va., 80 S. E. 471.